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E. ROBERT SEAVER,

In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, *et al.*,
PETITIONERS,
v.
COMMONWEALTH OF MASSACHUSETTS, *et al.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR REHEARING

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The petitioners herein respectfully move this Court for an order vacating its denial of their petition for writ of certiorari, entered on June 15, 1970, and granting the petition. As grounds for this motion, the petitioners say as follows.

1. ALL JUSTICES OF THE COURT SHOULD BE AFFORDED AN OPPORTUNITY TO PARTICIPATE IN THE DECISION.

This case involves state censorship and suppression of a documentary motion picture film entitled *Titicut Follies*,

which shows the abysmal conditions existing at a state prison in Massachusetts.

A petition for writ of certiorari to the Supreme Judicial Court of Massachusetts was filed on September 19, 1969. The petition was denied on June 15, 1970.

Three Justices of this Court were of the opinion that the writ should have been granted. Presumably the writ would have been granted if one additional Justice had so voted. Mr. Justice Marshall did not participate in the consideration or decision of the petition. So far as the petitioners are aware, he is not disqualified for any reason from participation in the matter.

In light of the importance of the issues presented by the petition, petitioners submit that all nine justices of this Court should be afforded the opportunity to participate in the decision whether or not to grant the writ.

As noted in the original petition, this case presents novel and important First Amendment issues; and if this Court does not grant the writ, it will mark the first instance in which state censorship and suppression of a motion picture film of conceded social interest and importance has been permitted to stand.

Mr. Justice Harlan filed a dissenting opinion to the denial of the writ, observing that "I fail to see how, on a complex and important issue like this, it can be concluded that this Court should withhold plenary review." (Mr. Justice Brennan joined in that dissenting opinion; Mr. Justice Douglas also was of the opinion that certiorari should be granted.)

The importance of review by this Court also is demonstrated by comments in eminent law reviews published after filing of the petition: Comment, The "Titicut Follies" Case: Limiting the Public Interest Privilege, 70 Colum. L. Rev. 359 (1970); Note, 83 Harv. L. Rev. 1722 (May, 1970),

2. THE PETITIONERS HAVE BEEN SUED FOR $5,750,000 IN DAMAGES IN TWO RELATED CASES INVOLVING THE SAME ISSUES.

On September 23, 1969, four days after the petition for writ of certiorari was filed in this Court, two civil actions were commenced against the petitioners in the Superior Court of the Commonwealth of Massachusetts for Suffolk County. The actions purport to have been brought on behalf of James C. Bulcock, a respondent in this case, and thirty-four other inmates of the Bridgewater institution depicted in the film *Titicut Follies*. In one action (docket number 648364) the plaintiffs seek damages of $5,000,000.00. In the other action (docket number 648366) the same plaintiffs seek damages of $750,000.00 The actions have not been tried on the merits. Presumably an application for a stay of further proceedings would be granted if the Court granted certiorari in this case.

These actions for damages obviously have a chilling effect upon any publication of the film, even to the limited extent authorized by the decisions of the Massachusetts courts.

The same important constitutional issues of freedom of speech and press presented by this case are involved in the damage actions. More particularly, the scope and effect of the decision of this Court in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) is directly in issue.

The petitioners submit that review of this case by the Court would result in a decision on the merits which would be dispositive of the damage actions for all practical purposes, and which would protect the petitioners from further exposure to financial liability and harrassment in connection with the exercise of their rights to publish information on matters of public concern.

3. The Decision of the Court in the Atlantic Coast Line Case Has Given Added Importance to Review by Certiorari in This Case.

The petitioners have had no decision by any federal Court as to their constitutional rights to publish the film here in issue, although a party generally is entitled to "choice of a federal forum for the hearing and decision of his constitutional rights." *Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967). Accordingly, the petitioners have contemplated that, in the event that this Court denied certiorari, they would commence an action in a United States District Court to seek declaratory relief as to their constitutional rights, in accordance with the provisions of 42 U.S.C. 1983, and then, if necessary, injunctive relief against enforcement of the present state court injunction. *Zwickler* v. *Koota* 389 U.S. 241, 255 (1967).

This Court had not decided whether 42 U.S.C. 1983 creates an exception to the anti-injunction statute 28 U.S.C. 2283. See *Cameron* v. *Johnson,* 390 U.S. 611, 613, footnote 3 (1968). There is respectable authority for the proposition that such an exception exists, at least in First Amendment cases. *Machesky* v. *Bizzell,* 414 F.2d 283, 287, 291 (5th Cir. 1969). This Court also has implied that injunctive relief against enforcement of a state court decision may be granted as supplementary to federal declaratory judgment relief. *Zwickler* v. *Koota,* 389 U.S. 241, 255 (1967).

However, the decision of this Court on June 8, 1970, in the case of *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* —— U.S. ——, 38 Law Week 4471, in which it was held that 28 U.S.C. 2283 precluded a federal court injunction to prevent the enforcement of a state court injunction against picketing, creates doubts that the petitioners now may obtain effective protec-

tion of their constitutional rights in any federal forum other than this Court.

If that is the meaning and effect of the *Atlantic Coast Line* decision (which did not discuss or distinguish the *Dombrowski- Zwickler-Cameron* line of cases), then it has become more important than ever before that the Court grant the writ and review the judgment of the state court in the present case.

Conclusion

For the reasons set forth above, and those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment below.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

No. 627

Motion of Nat. Educ. Television for leave to file brief, as amicus curiae, in support of rehearing filed on July 10, 1962

(Not printed)